IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. [redacted] 71

DAVID EARL GUTKNECHT,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MELVIN L. WULF
156 Fifth Avenue
New York, New York 10010

CHESTER BRUVOLD
625 2nd Avenue South
Minneapolis, Minnesota 55402

Attorneys for Petitioner

TABLE OF CONTENTS

TABLE OF CASES AND STATUTES

Cases:

PAGE

United States Constitution:

Rule:

Federal Rules Criminal Procedure:

Army Regulations:

Military Selective Service Act of 1967:

Selective Service Regulations:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. .....

DAVID EARL GUTKNECHT,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in the above-entitled case on January 20, 1969.

Opinions Below

The decision of the Court of Appeals is unreported. It is set out in the Appendix, *infra,* pp. 17-22. The memorandum and findings of fact of the district court is reported at 283 F. Supp. 945 and is set out in Appendix, *infra,* pp. 23-31.

Jurisdiction

The judgment of the Court of Appeals was entered on January 20, 1969. On February 11, 1969, Mr. Justice White entered an order extending until March 21, 1969, the time for filing this petition for certiorari. Jurisdiction is conferred on this Court by 28 U. S. C. §1254(1).

Questions Presented

1. Petitioner was classified I-A in June, 1967, at which time he was nineteen years old. He returned his Selective Service Registration Certificate and Notice of Classification to the government in October, 1967, as a statement of protest against the war in Vietnam. On December 21, 1967, petitioner was declared delinquent for failure to possess his draft cards and on December 26, 1967 he was sent an order to report for induction on January 24, 1968. He was subsequently convicted of failing "to report for and submit to induction." Under these circumstances:

a. Does the declaration of delinquency and the priority induction order issued to petitioner for failure to have his Registration Certificate and Notice of Classification in his personal possession, violate the due process clause of the Fifth Amendment, the Sixth Amendment, the Military Selective Service Act of 1967, and the Selective Service Regulations?

b. Do Selective Service Regulations 1617.1 and 1623.5, as construed and applied in this case, and Selective Service Regulation 1642.4 on its face, violate the First Amendment?

2. Whether the government proved that petitioner failed "to report for and submit to induction" when it was con-

ceded he had reported and also conceded that the prescribed procedure for submitting was not followed.

3. Whether petitioner's motion under Rule 12(b)(2), Fed. R. Cr. P., for duplicity in the indictment was improperly denied.

Statutes and Regulations Involved

Military Selective Service Act of 1967, Sec. 12(a); 50 App. U. S. C. Sec. 652(a), is set out in the Appendix, *infra*, pp. 32-33.

Selective Service Regulation 1642.4; 32 CFR Sec. 1642.4, is set out in the Appendix, *infra*, pp. 33-34.

Selective Service Regulation 1631.7; 32 CFR Sec. 1631.7, is set out in the Appendix, *infra*, pp. 34-36.

Selective Service Regulation 1617.1; 32 CFR Sec. 1617.1, is set out in the Appendix, *infra*, pp. 36-37.

Selective Service Regulation 1623.5; 32 CFR Sec. 1623.5, is set out in the Appendix, *infra*, p. 37.

Army Regulation 601-270, para. 37, is set out in the Appendix, *infra*, pp. 37-40.

Army Regulation 601-270, para. 40(c), is set out in the Appendix, *infra*, pp. 40-42.

Statement of the Case[1]

Petitioner registered with Selective Service Local Board No. 115, Gaylord, Minnesota, on December 20, 1965, a few days after his eighteenth birthday. He was classified I-A on February 15, 1966, and reclassified II-S (student) on March 15, 1966. On June 21, 1967 petitioner was again classified I-A after he had notified his Local Board, by letter dated May 15, 1967, that he was no longer a student.

On November 23, 1966, petitioner had filed an application with his Local Board for exemption as a conscientious objector under Section 6(j) of the Universal Military Service and Training Act (subsequently renamed the Military Selective Service Act of 1967, and hereafter called "the Act"). The application for conscientious objector status was denied by the Local Board on June 21, 1967, and petitioner duly noted his appeal to the State Appeal Board on July 20, 1967.

On October 16, 1967, as part of a nation-wide protest against the war in Vietnam, petitioner surrendered his Registration Certificate (SSS Form 2) and Notice of Classification (SSS Form 110) by leaving them on the steps of the Federal Building in Minneapolis with a statement explaining the basis of his protest. On the same date petitioner's Registration Certificate and Notice of Classifica-

---

[1] Except for those facts which are supported by references to the transcript of trial (designated by the symbol "T"), the Statement of the Case is based upon the contents of petitioner's Selective Service file which was introduced at trial as Government Exhibit No. 1.

tion were sent to the Minnesota State Director of Selective Service, and on the following day were sent to the Minneapolis office of the Federal Bureau of Investigation at its request.

On October 24, 1967, Local Board Memorandum No. 85 was issued by the Selective Service System (Defendant's Exh. B; App., *infra,* p. 45) and on October 26, 1967 General Lewis B. Hershey, Director of the Selective Service System issued a special letter (Defendant's Exh. C; App. *infra,* p. 43), which encouraged the reclassification of registrants who surrendered their Selective Service documents or who engaged in a variety of other actions thought by General Hershey to be disruptive of the Selective Service System or not in the national interest.

On November 22, 1967, the Minnesota State Director's office notified Local Board No. 115 that petitioner's conscientious objector appeal was denied. On November 27, 1967, petitioner was sent a Notice of Classification advising him of the Appeal Board decision and notifying him again that he was I-A.

On December 21, 1967, petitioner was sent a Delinquency Notice (SSS Form 304) which stated that he had been declared delinquent for failing to have his Registration Certificate and Notice of Classification in his possession.

Five days later, on December 26, 1967, petitioner was sent an order to report for induction (SSS Form 252) on January 24, 1968.

On January 24, 1968, petitioner appeared at Local Board No. 115 pursuant to the order to report for induction (T. 15) where "he joined the rest of the group and got on the

bus and left for the Federal Building in Minneapolis" (T. 15-16).

At the induction center in Minneapolis, petitioner "indicated" to the military personnel there that "he had no intentions to process in any way, such as physical examination or mental" (T. 23). He was then informed "of the regulations pertaining to refusal to process for induction" (T. 24-25) and informed of the penalties for "refusing to be inducted into the service . . ." (T. 25, 40). Petitioner was not given the opportunity to take the one step forward, as prescribed by Army Regulation 601-270(37)(1) nor was the statement of imminent induction, also required by Army Regulations 601-270(37)(1), ever read to him (T. 35, 43). Petitioner signed a statement that said "I refuse to take part in any or all of the prescribed processing" (T. 29).

In March 1968, petitioner was indicted in the following terms:

> "That on or about the 24th day of January, 1968, at the City of Minneapolis, County of Hennepin, in the State and District of Minnesota, DAVID EARL GUTKNECHT willfully and knowingly did fail and neglect to perform a duty required of him under and in the execution of the Universal Military Training and Service Act and the rules, regulations and directions duly made pursuant thereto in that he did fail and neglect to comply with an order of his local board to report for and submit to induction into the armed forces of the United States, in violation of Title 50 App., United States Code, Section 462."

He was tried without a jury, found guilty, and sentenced to four years' imprisonment. The conviction was affirmed by the Court of Appeals on January 20, 1969. The court held that petitioner's surrender of his draft cards was not protected by the First Amendment, following *O'Brien* v. *United States,* 391 U. S. 367 (1968), that his accelerated induction as a delinquent was not "lawless or irregular," and that the facts alleged in the indictment had been proved.

Reasons for Granting the Writ

1. Certiorari should be granted in this case to determine the statutory and constitutional validity of the delinquency regulation and practice under the Military Selective Service Act of 1967.

In this criminal case, the issue of pre-induction judicial review under Section 10(b)(3) of the Military Selective Service Act, which has been and is now before the Court in a variety of cases,[2] is not present. Neither is the question of delinquency reclassification present in this case as it is in the cases cited in note 3, *supra,* for petitioner here was already classified I-A at the time he was declared delinquent. The consequence of that declaration was to subject him to priority induction under Reg. 1631.7, the so-called "order of call" regulation. App., *infra,* pp. 34-36.

What is starkly present in this case, therefore, is the validity of the delinquency procedures under Reg. 1642.4.

---

[2] *Oestereich* v. *Selective Service Board,* 37 U. S. L. Week 4053; *Breen* v. *Selective Service,* No. 1144; *Kolden* v. *Selective Service,* No. ——.

Furthermore, that validity must be examined in this case in light of the peaceful political protest activity which generated the invocation of those procedures.

The "order of call" established by Reg. 1631.7 has been described as "a matter of substance central to the present statutory scheme of the Selective Service System." *United States* v. *Lybrand,* 279 F. Supp. 74, 78 (E. D. N. Y. 1967). The President, the Congress and the people are "all agreed that some clear system for determining order of selection must be maintained." *Ibid.*

The significance of petitioner's priority induction is obvious. At the time he was declared delinquent he was only nineteen. If not declared delinquent, he would have been subject to call only under subsection (3) of Reg. 1631.7, as a non-volunteer with older men up to age twenty-six being selected first.

The record does not show when petitioner might have been called had he not been declared delinquent. Having been declared delinquent, however, he was deprived of any possibility otherwise available to have sought a classification other than I-A. For example, he might have taken a job which would have entitled him to an occupational deferment under Section 6(h)(2) of the Act, or he might have enrolled as a divinity student and been eligible for a Section 6(g) exemption. But being declared delinquent, he was immediately deprived of the opportunity to exercise any of those options or others which might have been open to him.

Under these circumstances, the Court should decide the following important questions of federal law relating to

the delinquency procedures which have not been but should be settled.

a. The Court should settle the important question whether petitioner's declaration of delinquency and priority induction was punishment, see *Kennedy* v. *Mendoza-Martinez,* 372 U. S. 144 (1963), and, if so, whether those procedures violate the due process clause of the Fifth Amendment and the provisions of the Sixth Amendment.

For brevity's sake, petitioner will not repeat in detail the *Mendoza-Martinez* argument. It was presented at length to the Court in *Oestereich,* it was described by Mr. Justice Harlan in his concurring opinion in *Oestereich* as "non-frivolous," *supra,* at 4056, n. 6, and was conceded by the government in its *Oestereich* brief to be a "serious constitutional question" (p. 49). The *Mendoza-Martinez* issue is set out in more detail at pp. 15-17 of the petition for certiorari in *Breen* v. *Selective Service,* No. 1144, this Term, and petitioner incorporates that material by reference here.

There is need only for one additional observation. Where delinquency is linked to reclassification, a registrant at least has the opportunity, under the Selective Service System hearing and appellate procedure (Regs. Parts 1624-1627), to try to persuade administrative officers to return his initial deferred or exempt classification. Petitioner, however, having been classified I-A at the time of his declaration of delinquency, was deprived even of that marginal benefit. Indeed, he was issued an order to report for induction only five days after his delinquency notice was mailed to him and he was therefore effectively denied even the right to act upon the invitation printed on the delinquency notice "to report to this local board immediately in

person or by mail, or . . . take this notice to the local board nearest you for advice as to what you should do." Five days is hardly a reasonable time to respond, particularly when three of those days consisted of a long Christmas weekend. See *In re Gault,* 387 U. S. 1, 32-33 (1967).

b. Certiorari should be granted to settle the important question whether petitioner's declaration of delinquency and priority induction is authorized by the Military Selective Service Act of 1967 or the Selective Service Regulations.

In its brief in *Oestereich,* the government conceded grave doubts concerning the validity of the delinquency procedures (p. 54):

> "It is difficult to believe that Congress intended the local boards to have the unfettered discretion to decide that any violation of the Act or regulations warrants a declaration of delinquency, reclassification and induction, regardless of its relationship to the individual's status as exempt or deferred or whatever. Congress prescribed criminal prosecution for such violations, and also provided for exemptions and deferments for certain classes of individuals to reflect considerations of national interest apart from simply raising manpower for the Army. Termination of such status through delinquency reclassification may effectively undermine that congressional determination and thus be inconsistent with the Selective Service Act."

The government also granted that the unfettered discretion given to local boards under Reg. 1642.4(c) to restore a registrant's prior classification presented a serious ques-

tion whether the regulations did not conflict with the Act (pp. 54-55). The possibility of constitutional infirmities was also recognized by the government including the delegation of power to local boards "without standards for the exercise of sweeping discretion given them by the regulations," and the "absence of any specified nexus or reasonable relationship between the violation which triggers reclassification and induction, and the registrant's status vis-à-vis the Selective Service System [which] might be viewed as inconsistent with due process notions." (p. 56.)

The government also referred not unfavorably to the opinion of Judge Dooling in *United States* v. *Eisdorfer*, 1 S. S. L. R. 3115 (E. D. N. Y. 1968), in which he observed that "The delinquency regulations, moreover, disregard the structure of the Act; deferments and priorities-of-induction, adopted in the public interest, are treated as if they were forfeitable personal privileges." *Id.* at 3116.

This Court in *Oestereich* recognized that "Congress did not define delinquency; nor did it provide any standards for its definition by the Selective Service System." *Supra* at 4054. The Court found, of course, that to whatever use the delinquency regulations might be put, revocation of statutory exemptions was not one of them. And, added the Court, "Even if Congress had authorized the Boards to revoke statutory exemptions by means of delinquency classification, serious questions would arise if Congress were silent and did not prescribe standards to govern the Boards' actions." *Ibid.*

It is apparent, therefore, that there are serious and unresolved statutory and constitutional issues present which should be settled by this Court in this case where a

registrant was sentenced to four years imprisonment under a very dubious administrative practice.

In addition, there are important issues of federal law involved in the question whether petitioner's delinquency and priority induction are authorized by the Selective Service Regulations themselves. Petitioner respectfully refers the Court to pp. 18-21 of the petition for certiorari in *Breen* v. *Selective Service,* No. 1144, this Term, where this argument is set forth.

c. Certiorari should be granted to settle the important question whether Reg. 1642.4, upon which petitioner's delinquency and priority induction are based, is vague and overbroad.

d. Certiorari should be granted to settle the important question whether petitioner's surrender of his draft cards was conduct protected by the First Amendment.

The reasons for granting the writ to review the issues in Sec. 1 (c) and (d) are identical to the reasons set forth at pp. 21-26 of the petition for certiorari in *Breen* v. *Selective Service,* No. 1144, this Term. Petitioner, for brevity's sake, respectfully refers the Court to that material.

2. Certiorari should be granted because the decision of the Court below, relating to the question whether petitioner was given the opportunity to submit to induction, is in conflict with the decision of the Ninth Circuit in *Chernekoff* v. *United States*, 219 F. 2d 721 (1955).

The essence of the charge against petitioner was that "he did fail and neglect to comply with an order of his local board to report for and submit to induction."

The record is plain, and the courts below and the government acknowledge, that petitioner did "report" for induc-

tion and that he was not given the opportunity to "submit" as prescribed by Army Regulations. The issue in dispute, therefore, is whether his conviction for failing "to report for and submit to induction" can stand.[3]

The procedure regulating the induction process is set forth in precise detail in Army Regulation 601-270.[4] Paragraph 37(a) provides that "all registrants" will be assembled and informed "of the imminence of induction, quoting the following: . . ." The quote which follows informs the group that "they will take one step forward as your name and service are called and such step will constitute your induction into the Armed Forces indicated." Paragraph 37(a)(2) provides for the quiet and courteous removal of any registrant who fails to take the requisite step forward.

Paragraph 40(c) sets out the procedure to be followed with registrants who refuse to submit to induction and who have been removed from the group under paragraph 37(a)(2). Any such registrant is to be informed that his refusal to submit is a felony subject to 5 years imprisonment and a $10,000 fine, or both; he will again be informed of the imminence of induction by the language specified in paragraph 37(a)(1) and given a second chance to take one step forward. If he again refuses, the registrant will be requested to sign a statement saying "I refuse to be inducted into the Armed Forces of the United States." He is then free to go (though in some federal judicial districts a registrant who refuses to submit is arrested on the spot).

---

[3] Prior to trial, petitioner moved to quash the indictment for duplicity but the motion was denied. Petitioner preserves this claim should certiorari be granted, but does not now argue it.

[4] Induction centers are under the control and operation of the armed forces. Selective Service Regs. 1602.7, 1632.14(b), 1632.15(e).

None of this procedure was followed in petitioner's case. Rather, after properly reporting for induction, he notified the military personnel at the induction center that "he had no intentions to process in any way, such as physical examination or mental" (T. 23). Though informed of the penalties for refusing induction, petitioner was not given the opportunity to refuse under the explicit prescribed procedure of AR 601-270.

The court below barely discussed this issue. To the extent that it did, it relied on perfectly ambiguous language from *Billings* v. *Truesdell,* 321 U. S. 542, 557 (1944). The district court's opinion, which treated the issue to a slightly greater extent, is equally unilluminating. That opinion recognizes that petitioner was charged in the conjunctive, and though it acknowledges that petitioner did report and was not given the opportunity to submit, it concludes that "an order of a draft board to report for induction also encompasses an order to *submit* to induction." App., *infra,* p. 27. That, with deference, rather begs the question because, not having been given the opportunity to submit under AR 601-270, petitioner cannot be said to have disobeyed the draft board's order which "also encompasses an order to *submit* to induction."

The decision of the Eight Circuit is in conflict with the decision of the Ninth Circuit in *Chernekoff* v. *United States,* 219 F. 2d 721 (1955). The defendant there was not given the opportunity to step forward under the predecessor (but substantially equivalent) regulation to AR 601-270,[5] because "he had said he would not if asked to do so step forward and become inducted into the Armed

[5] The predecessor Army Regulation, 615-180-1, is set out at 219 F. 2d at 724, n. 12.

Forces." 219 F. 2d at 725. The Ninth Circuit, in reversing the conviction, said:

> "It does not matter that he might not have changed his mind. He should have been given the opportunity granted him by the Army's own regulations to seriously reflect and to let actions speak louder than words. . . . [I]t is highly important that the moment a selectee becomes subject to military authority be marked with certainty. It is also important that the moment he becomes liable for civil prosecution be marked with certainty. The special regulation fulfills such a need." *Ibid.*

This conflict between *Chernekoff* and the case at bar should be settled by this Court in order to make perfectly clear what the respective obligations of registrants and armed forces personnel are at the induction center. We urge, of course, that the *Chernekoff* rule is the sound rule for it eliminates any ambiguity about the intentions of a prospective draftee.[6]

---

[6] It may be that petitioner, if chargeable with any crime, could be charged under Sec. 12(a) of the Military Selective Service Act for violating Reg. 1632.14(4): "to obey the orders of the representatives of the Armed Forces while at the place where his induction will be accomplished," for his alleged refusal "to process in any way, such as physical examination or mental" (T. 23). Of course there is no evidence that he in fact refused "to process." There is only his alleged statement that he would not. Following *Chernekoff*, one would think a registrant could not be so charged unless first confronted with a physician or the papers for the mental tests.

The Army Regulations bear out this interpretation. AR 601-270 (40)(c)(4) makes distinct provision for inductees who refuse to take the preinduction tests and examinations. Such persons "will be informed that failure to submit to such examination . . . is a violation of Selective Service Regulations and punishable as such."

CONCLUSION

For the reasons stated above, certiorari should be granted.

Respectfully submitted,

MELVIN L. WULF
156 Fifth Avenue
New York, New York 10010

CHESTER BRUVOLD
625 2nd Avenue South
Minneapolis, Minnesota 55402

Attorneys for Petitioner

March 19, 1969.

APPENDIX

APPENDIX

Opinion of the United States Court of Appeals for the Eighth Circuit

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 19,407

UNITED STATES OF AMERICA,

Appellee,

—v.—

DAVID EARL GUTKNECHT,

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

[January 20, 1969.]

Before:

MATTHES, GIBSON and LAY,

Circuit Judges.

LAY, *Circuit Judge.*

Defendant appeals his jury-waived conviction of violation of the Selective Service Law. On June 21, 1967, defendant was classified 1-A by his local draft board after a review of his claimed status as a conscientious objector. Defendant appealed to his state appeal board which, on

November 1, 1967, approved his 1-A classification. On December 20, 1967, his local board declared him delinquent for failure to have in his possession his registration card and classification card. He was ordered to report for induction into the Armed Services on January 24, 1968. On that date he reported to his place of induction but advised army officials he would not take part in any induction processing, including the preliminary physical examination. Defendant was then properly warned of the penalty and at that time gave to the army officers a prepared statement which said in part: "... the Draft and Vietnam War seem to me indefensible. The laws of the Selective Service System are not worthy of obedience...."

The full text of the district court's well-reasoned opinion is found in 283 F.Supp. 945. We affirm. Defendant, relying upon *Chernekoff* v. *United States,* 219 F.2d 721 (9 Cir. 1955), asserts that the letter of the law was not carried out in that he actually did report for induction but was not afforded the opportunity to go through the regular formal induction ceremony. The defendant additionally complains that the indictment was "duplicitious" in that it stated two different offenses in one count, to-wit, failure to report and failure to submit to induction. Defendant urges that the phraseology of the indictment requires the government to prove *both* charges beyond a reasonable doubt or fail to convict.

As the district court relates, the United States Supreme Court in *Billings* v. *Truesdell,* 321 U.S. 542, 557 (1944) has answered these arguments:

> "It must be remembered that §11 imposes on a selectee a criminal penalty for any failure 'to perform any duty required of him under or in the execution' of the Act 'or the rules or regulations made pursuant thereto.'

> He who reports to the induction station but refuses to be inducted violates §11 of the Act as clearly as one who refuses to report at all [cite omitted]. The order of the local board to report for induction includes a command to submit to induction. Though that command was formerly implied, it is now express."

On October 16, 1967, defendant participated in a "Stop-the-Draft-Week" demonstration in Minneapolis. He dropped his Selective Service registration card as well as his classification card at the Deputy United States Marshal's feet. He attached with them a mimeograph explanation of his action. On December 20, 1967, the defendant was declared delinquent by his local board for failure to have possession of his registration card and his notice of classification. Immediately thereafter defendant was ordered to report for induction on January 24, 1968.

Defendant now claims that he was being unlawfully punished for his political views on the Vietnam War and states that the board's punitive action was in violation of his First Amendment rights. The district court, however, found that there was no evidence at trial to support defendant's contention that his delinquency order was based upon his political views. The district court found that the delinquency order was based upon the defendant's violation of the regulation that he have the required cards in his possession at all times. 32 C.F.R. §§ 1617.1 and 1623.5. The district court found that the delinquency order and the order for induction were therefore authorized under 32 C.F.R. §§ 1602.4, 1642.4 and 1631.7.

By placing his draft certificates beyond "continuing availability," Gutknecht "wilfully frustrated [a] governmental interest." It is now settled that such frustration was

"non-communicative" and is not protected by First Amendment principles. *United States* v. *O'Brien,* 391 U.S. 367 (1968).

Moreover, we are not confronted with an illegal reclassification which revokes a statutory exemption, as in *Oestereich* v. *Selective Service System Local Board No. 11,* 37 U.S.L.W. 4053 (U.S.Sup.Ct. 1968). Although found delinquent by the local board on December 20, 1967, the order of delinquency did not relate to a reclassification. Defendant had been classified 1-A since June 21, 1967. Defendant makes no claim upon appeal that his 1-A classification was not based on evidence or that he was denied fair administrative procedures in regard to his classification. Admittedly, defendant's induction date was advanced pursuant to Tit. 50 U.S.C. § 456(h)(1) which gives priority of induction to "delinquents." The regulations (32 C.F.R. § 1631.7) specify the order of induction based upon a specified priority of status of all persons having 1-A or 1-A-O status. This priority is administratively created. We know of no legal reason why the order of call cannot be administratively altered as long as it is done "impartially" without discrimination. Congress has authorized:

> "The selection of persons for training and service . . . shall be made in an *impartial manner, under such rules and regulations as the President may prescribe,* from the persons who are liable for such training and service and who at the time of selection are registered and classified, *but not deferred or exempted* . . ." (Emphasis ours.) Tit. 50 U.S.C. § 455(a)(1).

We emphasize we are not confronted here with a reclassification which has no basis in fact or which attempts to

deprive the defendant of any existing statutory exemption or deferment.

The board is given certain administrative discretion in carrying out congressional policy. This discretion should be upheld as long as it is reasonably related to a governmental interest and is not otherwise exercised unlawfully. In the instant case the board's regulation concerning possession of the registration card is a reasonable one and related to government interests. See *United States* v. *O'Brien, supra.* The board's self-promulgated definition of "delinquency" is not unreasonable when its effect does not otherwise punish an individual by depriving him of a right given him by statute. It is only *"that* use of delinquency" which is proscribed by the *Oestereich* case. Here the defendant does not claim any kind of deferment, let alone exemption. Involved here is the order of call for induction of those already classified 1-A. Since the order of call is governed by regulation (1631.7) reasonable conditions may be administratively attached to it. Although a local board may not arbitrarily or discriminatorily abuse the order of call,[1] if it is reasonably and impartially administered there can exist no legal fault in its administrative handling.

To establish irregularity in the board's findings of "delinquency,"' the adjudicated effect of the board's action becomes the relevant test. Here the defendant is not deprived of either statutory exemption or deferment; here the board gave notice to him that he was delinquent under its regulations for failure to have his certificate; here he was given a reasonable period to correct this delinquency; here he had statutory notice that he was subject to be drafted ahead of those in the "prime age group." Defen-

[1] Cf. *United States* v. *Lybrand,* 279 F.Supp. 74 (E.D. N.Y. 1967).

dant's right to be called in order was one which had been given only by administrative grace and which had been reasonably conditioned upon overall compliance with the Selective Service laws. The evidence is clear that defendant violated these laws. Under these circumstances induction of the defendant was not lawless or irregular.

Judgment affirmed.

Opinion of the United States District Court for the District of Minnesota

UNITED STATES DISTRICT COURT

D. Minnesota,
Third Division.
May 9, 1968.

4-68-Cr.-22.

UNITED STATES OF AMERICA,

Plaintiff,

v.

DAVID EARL GUTKNECHT,

Defendant.

MEMORANDUM
&
FINDINGS OF FACT

DEVITT, *Chief Judge*:

In this jury-waived criminal case charging the defendant with violation of the Selective Service Law, the issue as created by the indictment and the defendant's plea of not guilty is whether the government has proved the defendant guilty beyond a reasonable doubt.

The defendant is a 21-year-old resident of Winthrop, Minnesota, and is charged under 50 App., United States Code, § 462 with wilfully and knowingly failing and neglecting to comply with an order of his local Selective Service Board to report for and submit to induction into the armed forces of the United States.

The record shows that the defendant completed and filed the required classification questionnaire (SSS Form No.

100) on January 17, 1966 and was assigned Selective Service No. 21–115–47–162. His draft board, Sibley County, Minnesota Board No. 115, classified him 1-A on February 15, 1966, 2-S on March 15, 1966, and again 2-S on December 21, 1966. The expiration date of the last 2-S classification was October 1, 1967.

On November 23, 1966 the defendant signed and filed a conscientious objection form (SSS Form No. 150). On June 16, 1967 the local board notified the defendant to appear before it on June 21, 1967, at which time the Board would consider his reclassification. On June 21, 1967 he was reclassified 1-A and officially notified of that fact.

The defendant appealed this classification to the State Appeal Board, which, on November 1, 1967, classified him 1-A by a vote of 5 "yes" and 0 "no." The defendant was notified of this action.

On December 20, 1967 Local Board No. 115 declared the defendant delinquent for failure to have in his possession Selective Service Registration card (SSS Form No. 2) and Notice of Classification (SSS Form No. 110). He was advised of this declaration of delinquency on December 21, 1967.

An order to report for induction was mailed to defendant on December 26, 1967, directing him to report for induction at the courthouse at Gaylord, Minnesota, on January 24, 1968 at 6 A.M. He did so report and was transported to the armed forces induction station at Minneapolis, Minnesota.

Upon arrival there the defendant advised Sergeant First Class Billy O'Neil that he would not take part in any induction processing. He was then escorted to the office of the Assistant Processing Officer, Lt. Larry J. Petrie. Petrie advised him that a refusal to process constituted a felony punishable by imprisonment for not more than 5 years

and/or a fine of not more than $10,000 or both. Defendant advised Petrie that he was aware of the penalty for refusing to process. Defendant then presented to the processing officer a prepared statement containing his reasons for refusal to process for induction.[1] At that time he wrote on the

---

[1] The defendant said "* * * the Draft and Vietnam war seem to me indefensible. The laws of the Selective Service System are not worthy of obedience. * * *" His complete statement reads:

"To my fellow Americans. Today I am refusing to be inducted into the United States armed forces. This is a result of my decision last fall to return my draft cards and refuse further cooperation with the Selective Service System.

"Conscription seems to me fundamentally authoritarian and anti-democratic. Its coercive attempts to control the lives of young American men are socially disastrous and humanly outrageous. Primarily, the draft functions to supply the manpower necessary for those few holding real political and military power in this country to continue to commit crimes against humanity in waging a cruel and senseless war in Southeast Asia. Both the Draft and the Vietnam war seem to me indefensible. The laws of the Selective Service System are not worthy of obedience. Those who feel that my decision is 'idealistic' and 'impractical' make the mistake of assuming that there can be a real division between morality and politics. Those people who are called 'realists' and compromise on the most crucial of issues, and those who are silent, are furthering the present disastrous course of this country.

"But we are none of us innocent. I am simply asking that each of you examine your thoughts and your actions. As for myself, I shall probably be in prison before too long, and out again after a few years. This is a small price to pay compared to what so many, many American men and Vietnamese men, women, and children have to pay. To those in the military, I ask that you consider resigning or obtaining a discharge. To my fellow young men, in particular, I ask that you find some alternative—any alternative—to military service.

"Many of you will disagree with me; I respect your position, and only ask that you reconsider. Many will agree; I hope that you do as much as you are capable of doing. We have so little time.

/s/ DAVE GUTKNECHT
"Dave Gutknecht
January 24, 1968"

statement, "I refuse to take part, or all, (sic) of the prescribed processing," and signed his name.

It was not contended at trial that the defendant's classification was improper. There is a basis in the record for the 1-A classification made by Local Board No. 115.

The essential elements required to be proved by the government are (1) that a lawful order to report for induction on January 24, 1968 was issued by Local Board No. 115; (2) that the defendant refused to obey the order to report for, and submit to, induction; and (3) that the defendant acted wilfully, unlawfully and knowingly.

There is no dispute as to the facts, but the defense offered by the defendant is that (1) the defendant actually did report for induction but was not afforded the opportunity to go through the regular formal induction ceremony prescribed by the pertinent regulations, and until such formal ceremony is afforded him he has not refused induction; and (2) the induction order, while apparently based on non-possession of classification and registration cards, was in fact directed at his anti-Vietnam activities and thus violated his right to free speech.

The defendant urges, in connection with his first defense, that an order to report for induction does not include the duty to submit to induction without proof that the defendant was offered the opportunity to participate in a formal induction ceremony. The defendant urges that regulations AR 601-270, Par. 37 and AR 601-270, Par. 40(c) require that a potential inductee into the armed forces must be afforded an opportunity to take "one step forward" as a signal of his departure from civilian, and entry into military discipline, and that this formal induction ceremony was not afforded the defendant. The defendant urges that a making of the statement,

> "You are about to be inducted into the armed forces of the United States, in the Army, the Navy, the Air Force, or the Marine Corps, as indicated by the service announced following your name when called. You will take one step forward as your name and service are called, and such step will constitute your induction into the armed forces indicated,"

was a condition precedent to induction, but that procedure was not followed.

There is no dispute in the record that such was not done, and it appears that the reason is that the "step forward" procedure under the regulations is only to be taken *after* the inductees are given mental and physical tests in order to determine their eligibility for service in the armed forces. This defendant refused to take the physical or mental tests or participate in any other procedure incident to induction.

[1, 2] Here the defendant is not being charged with failure to take "one step forward," but with failure to comply with the Board's order to report for, and submit to, induction. It is clear from the regulations that an order of a draft board to report for induction also encompasses an order to *submit* to induction. 32 C.F.R. § 1632.14, a part of the Selective Service Regulations promulgated by the President under authority of the statute, provides that it is the duty of the registrant upon receiving an order to report for induction to (a) report for induction at the time and place fixed in such order, and (b) to submit to such induction.

This regulation was initially adopted by Executive Order 10001, 13 F.R. 5488, September 21, 1948, amended by Executive Order 10659, 21 F.R. 1103, February 17, 1956,

and by Executive Order 10984, 27 F.R. 200, January 9, 1962.

The Congress of the United States has specifically authorized the President to prescribe these, and other, rules and regulations to carry out the provisions of the Selective Service Act by 50 App. 460(b) (1).

The courts have held that the duty to report for induction contemplates the duty not only to report, but also to submit to induction. United States v. Collura, 139 F.2d 345 (2d Cir. 1943). The Supreme Court in Billings v. Truesdell, 321 U.S. 542, 64 S.Ct. 737, 88 L.Ed. 917 (1944), said:

> "He who reports to the induction station but refuses to be inducted violates § 11 of the Act as clearly as one who refuses to report at all. [Citations omitted.] The order of the Local Board to report for induction includes a command to submit to induction. * * *"

Later the Supreme Court in Estep v. United States, 327 U.S. 114, 66 S.Ct. 423, 90 L.Ed. 567 (1946), quoted Billings v. Truesdell, supra, as authority for the proposition that an order to report for induction includes the duty to submit to induction. Two subsequent decisions of the Court of Appeals, Ninth Circuit, are to the same effect. Williams v. United States, 203 F.2d 85 (1953); Bradley v. United States, 218 F.2d 657 (1954).

The defendant argues that a subsequent Ninth Circuit case, Chernekoff v. United States, 219 F.2d 721 (9th Cir. 1955) is contrary. But it will be observed in reading that case that the facts in it are distinguished from those in *Williams* and *Bradley*.

Defendant's counsel admits that this first defense is a "technical" one. In the court's view, it is not a meritorious one.

[3] Defendant's second defense is that the declaration of delinquency and the direction to report for induction were occasioned by his participation in an anti-Vietnam protest meeting and that the induction order based on such activities violates his right to free speech.

It appears from the Selective Service Board file that on October 16, 1967 the defendant did participate in a "Stop the Draft Week" demonstration at the federal office building in Minneapolis, and that during the demonstration he attempted to turn over his Selective Service card and registration card to a Deputy U. S. Marshal who refused to accept them. The defendant then dropped both cards at the Deputy Marshal's feet, together with mimeographed literature explaining his actions.

There is nothing in the Selective Service file or in any of the evidence received at trial to support the assertion that defendant's classification as a delinquent and order to report for induction were based on his expressions of opposition to the Vietnam war. But on the contrary, it appears that the action of the Selective Service Board was based on the defendant's violation of the regulations that he have the required draft cards in his possession at all times. 32 C.F.R. § 1617.1, 32 C.F.R. § 1623.5. It is not disputed that this defendant did not have his registration certificate (SSS Form No. 2) and his valid notice of classification (SSS Form No. 110) in his possession at all times.

In such circumstances the Selective Service Board was authorized to declare the defendant delinquent and to order

him to report for induction. 32 C.F.R. §§ 1602.4, 1642.4, 1631.7.

[4] But the defendant contends, nevertheless, that the discarding of his draft cards was symbolic conduct in protest to the Vietnam war, and that such conduct is protected by the First Amendment to the United States Constitution. The United States Supreme Court has not passed on that exact question, but two Courts of Appeal have. United States v. Miller, 367 F.2d 72 (2d Cir. 1966); O'Brien v. United States, 376 F.2d 538 (1st Cir. 1967). In *O'Brien* the court upheld the constitutionality of the regulations authorizing a Selective Service Board to declare delinquent, and order the induction of, persons found to be without possession of the required Selective Service cards, and in *Miller* the court upheld the constitutionality of Section 462(b) (3) which punishes the knowing destruction of draft cards. It is expected that the Supreme Court of the United States may soon pass on the constitutionality of a recently enacted Act making it a crime for a person to burn his draft card. That is a separate crime and not charged here.

Reference was made in the trial to a certain Local Board memorandum issued by National Selective Service System Director Hershey recommending procedures to be followed by local Selective Service Boards in the cases of registrants participating in anti-Vietnam demonstrations. The evidence in the record clearly shows that this defendant was declared delinquent and ordered to report for induction, not by authority of the so-called Hershey memorandum, but because of the defendant's non-possession of the required Selective Service cards in violation of the regulations.

[5] The Court has fully considered the exhibits, the testimony of the witnesses and has judged their credibility. The defendant is clothed with the presumption of innocence and his guilt must be proved beyond a reasonable doubt.

[6] In my view the United States has proved beyond a reasonable doubt every essential element of the crime charged in the indictment and the Court finds the defendant guilty of the crime charged in the indictment. The foregoing expression is intended to comply with Rule 23 of the Federal Rules of Criminal Procedure.

The Probation Officer is directed to prepare a presentence investigation report.

Sec. 12. *Penalties.*—(a) Any member of the Selective Service System or any other person charged as herein provided with the duty of carrying out any of the provisions of this title, or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty, and any person charged with such duty, or having and exercising any authority under said title, rules, regulations, or directions who shall knowingly make, or be a party to the making, of any false, improper, or incorrect registration, classification, physical or mental examination, deferment, induction, enrollment, or muster, and any person who shall knowingly make, or be a party to the making of, any false statement or certificate regarding or bearing upon a classification or in support of any request for a particular classification, for service under the provisions of this title, or rules, regulations, or directions made pursuant thereto, or who otherwise evades or refuses registration or service in the armed forces or any of the requirements of this title, or who knowingly counsels, aids, or abets another to refuse or evade registration or service in the armed forces or any of the requirements of this title, or of said rules, regulations, or directions, or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title, or rules, regulations, or directions made pursuant to this title, or any person or persons who shall knowingly hinder or interfere or attempt to do so in any way, by force or violence or otherwise, with the administration of this title or the rules or regulations made pursuant thereto, or who conspires to commit any one or more of such offenses, shall, upon conviction

in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment, or if subject to military or naval law may be tried by court martial, and, on conviction, shall suffer such punishment as a court martial may direct. No person shall be tried by court martial in any case arising under this title unless such person has been actually inducted for the training and service prescribed under this title or unless he is subject to trial by court martial under laws in force prior to the enactment of this title. Precedence shall be given by courts to the trial of cases arising under this title, and such cases shall be advanced on the docket for immediate hearing, and an appeal from the decision or decree of any United States district court or United States court of appeals shall take precedence over all other cases pending before the court to which the case has been referred.

Selective Service Regulations

1642.4 *Declaration of delinquency status and removal therefrom.*

(a) Whenever a registrant has failed to perform any duty or duties required of him under the selective service law other than the duty to comply with an Order to Report for Induction (SSS Form No. 252) or the duty to comply with an Order to Report for Civilian Work and Statement of Employer (SSS Form No. 153), the local board may declare him to be a delinquent.

(b) When the local board declares a registrant to be a delinquent, it shall enter a record of such action and the

date thereof on the registrant's Classification Questionnaire (SSS Form No. 100) and shall complete a Delinquency Notice (SSS Form No. 304), in duplicate, setting forth the duty or duties which the registrant has failed to perform. The local board shall mail the original to the registrant at his last known address and file the copy in his Cover Sheet (SSS Form No. 101).

(c) A registrant who has been declared to be a delinquent may be removed from that status by the local board at any time. When the local board removes a registrant from delinquency status, it shall enter a record of such action and the date thereof on the registrant's Classification Questionnaire (SSS Form No. 100) and shall advise the registrant of such removal by letter a copy of which shall be filed in his Cover Sheet (SSS Form No. 101).

1631.7 *Action by Local Board Upon Receipt of Notice of Call.*—(a) When a call is placed without designation of age group or groups, each local board, upon receiving a Notice of Call on Local Board (SSS Form 201) from the State Director of Selective Service (1) for a specified number of men to be delivered for induction, or (2) for a specified number of men in a medical, dental, or allied specialist category to be delivered for induction, shall select and order to report for induction the number of men required to fill the call from among its registrants who have been classified in Class I-A and Class I-A-O and have been found acceptable for service in the Armed Forces and to whom the local board has mailed a Statement of Acceptability (DD Form 62) at least 21 days before the date fixed for induction: *Provided,* That a registrant classified in Class I-A or Class I-A-O who is a delinquent may be selected and ordered to report for induction to fill

an induction call notwithstanding the fact that he has not been found acceptable for service in the Armed Forces and has not been mailed a Statement of Acceptability (DD Form 62); *And provided further,* That a registrant classified in Class I-A or Class I-A-O who has volunteered for induction may be selected and ordered to report for induction notwithstanding the fact that he has not been found acceptable for service in the Armed Forces and regardless of whether or not a Statement of Acceptability (DD Form 62) has been mailed to him. Such registrants, including those in a medical, dental, or allied specialist category, shall be selected and ordered to report for induction in the following order:

(1) Delinquents who have attained the age of 19 years in the order of their dates of birth with the oldest being selected first.

(2) Volunteers who have not attained the age of 26 years in the sequence in which they have volunteered for induction.

(3) Nonvolunteers who have attained the age of 19 years and have not attained the age of 26 years and who (A) do not have a wife with whom they maintain a bona fide family relationship in their homes, in the order of their dates of birth with the oldest being selected first, or (B) have a wife whom they married after the effective date (August 26, 1965) of this amended subparagraph and with whom they maintain a bona fide family relationship in their homes, in the order of their dates of birth with the oldest being selected first.

(4) Nonvolunteers who have attained the age of 19 years and have not attained the age of 26 years and

who have a wife whom they married on or before the effective date (August 26, 1965) of this amended subparagraph and with whom they maintain a bona fide family relationship in their homes, in the order of their dates of birth with the oldest being selected first.

(5) Nonvolunteers who have attained the age of 26 years in the order of their date of birth with the youngest being selected first.

(6) Nonvolunteers who have attained the age of 18 years and 6 months and who have not attained the age of 19 years in the order of their dates of birth with the oldest being selected first.

In selecting registrants in the order of their dates of birth, if two or more registrants have the same date of birth they shall, as among themselves, be selected in alphabetical order.

1617.1 *Effect of failure to have unaltered registration certificate in personal possession.*—Every person required to present himself for and submit to registration must, after he has registered, have in his personal possession at all times his Registration Certificate (SSS Form 2) prepared by his local board which has not been altered and on which no notation duly and validly inscribed thereon has been changed in any manner after its preparation by the local board. The failure of any person to have his Registration Certificate (SSS Form 2) in his personal possession shall be prima facie evidence of his failure to register. When a registrant is inducted into the armed forces or enters upon active duty in the armed forces,

other than active duty for training only or active duty for the sole purpose of undergoing a physical examination, he shall surrender his Registration Certificate (SSS Form 2) to the commanding officer of the joint examining and induction station or to the responsible officer at the place to which he reports for active duty, and such certificate shall be destroyed by the officer to whom it is surrendered.

1623.5 *Persons Required To Have Notice of Classification (SSS Form 110) in Personal Possession.*—Every person who has been classified by a local board must have in his personal possession at all times, in addition to his Registration Certificate (SSS Form 2), a valid Notice of Classification (SSS Form 110) issued to him showing his current classification. When any such person is inducted into the armed forces or enters upon active duty in the armed forces, other than active duty for training only or active duty for the sole purpose of undergoing a physical examination, he shall surrender his Notice of Classification (SSS Form 110) to the commanding officer of the joint examining and induction station or to the responsible officer at the place to which he reports for active duty, who shall destroy such notice.

Army Regulations

AR 601-270

37. *Induction. a.* The following procedure will be followed in the induction of all registrants into the Armed Forces:

(1) Registrants who have been determined to be fully qualified for induction in all respects will be as-

sembled. The induction officer will inform them of the imminence of induction, quoting the following:

"You are about to be inducted into the Armed Forces of the United States, in the Army, the Navy, the Air Force, or the Marine Corps, as indicated by the service announced following your name when called. You will take one step forward as your name and service are called and such step will constitute your induction into the Armed Forces indicated."

(2) Any registrant who fails or refuses to step forward when his name is called will be removed quietly and courteously from the presence of the group about to be inducted and processed as prescribed in paragraph 40*c*.

(3) A commissioned officer or warrant officer then will call the roll and the foregoing procedure will be carried out. All who have stepped forward will be informed that each and every one of them is a member of the Armed Forces concerned, using the language exactly as quoted:

"You have now been inducted into the Armed Forces of the United States indicated when your name was called. Each one of you is now a member of the Armed Forces concerned, and amenable to the regulations and the Uniform Code of Military Justice and all other applicable laws and regulations."

b. Oath of allegiance ceremony. The oath of allegiance is not a part of induction. Registrants who have been inducted will be informed that the taking of ceremonial oath

of allegiance is not a part of induction. The oath will be administered by any commissioned officer of any Armed Force as soon after the induction as practicable. In every instance there will be an appreciable break to insure that the taking of the ceremonial oath does not appear to be any part of the induction. The oath may be administered at any location as prescribed by the service in which inducted. If a nondeclarant alien is a member of the newly inducted group, the officer will explain the difference between the ceremonial oath of allegiance and the ceremonial oath of service and obedience.

(1) The oath of allegiance reads as follows:

"I, ..., do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign or domestic; that I will bear true faith and allegiance to the same; and that I will obey the orders of the President of the United States and the orders of the officers appointed over me, according to regulations and the Uniform Code of Military Justice. So help me God."

(2) In the event a nondeclarant alien does not desire to take the oath of allegiance, he may be administered the following oath of service and obedience, which oath will be substituted for the oath described in (1) above.

"I, ..., a citizen of ..... and without intention of surrendering such citizenship, do solemnly swear (or affirm) that I will serve the United States honestly and faithfully against all their enemies whomsoever, and that I will obey

the orders of the President of the United States and orders of the officers appointed over me, according to regulations and the Uniform Code of Military Justice."

(3) An inductee who refuses to subscribe to the oath of allegiance or the oath of service and obedience, whichever is appropriate, will be advised that he is already a member of the United States Army, Navy, Air Force, or Marine Corps, whichever is appropriate. For such an inductee DA Form 873 (Certificate of Clearance and/or Security Determination) will be prepared as provided in paragraph 112.

40. *Processing steps for registrants in special categories.*

c. Registrants who refuse to submit to induction. Any registrant who has been removed from the group as prescribed in paragraph 37*a*(2) and who persists in his refusal to submit to induction will be informed that such refusal constitutes a felony under the provisions of the Universal Military Training and Service Act, as amended. He will be informed further that conviction of such an offense under civil proceedings will subject him to be punished by imprisonment for not more than 5 years, or a fine of not more than $10,000, or both. He will then be informed again of the imminence of induction using the language specified in paragraph 37*a*(1) and his name and service number again will be called. If he steps forward at this time, he will be informed that he is a member of the Armed Forces concerned, using the language specified in paragraph 37a(3). If, however, he persists in refusing to be inducted, the following action will be taken:

(1) The registrant will be requested, but not required, to make a signed statement, dated, in his own handwriting, as follows: "I refuse to be inducted into the Armed Forces of the United States." Such statement should be witnessed by at least two witnesses who will affix their signatures to the statement. Registrants who refuse induction will not be furnished any means of transportation.

(2) Letter of notification or refusal to submit to induction will be prepared in quadruplicate. The original, together with the voluntary statement described in (1) above, will be submitted to the United States attorney for the district in which the registrant refused to be inducted. One copy will be forwarded to the State Director, Selective Service System, of the State in which the registrant refused to be inducted; one copy will be forwarded to the Selective Service local board which delivered the registrant for induction; and the other copy will be retained at the induction station. Such notification will include the following information:

(*a*) Name and address of registrant.

(*b*) Selective Service number of registrant.

(*c*) Number and address of the Selective Service local board which delivered the registrant for induction, and if different, the registrant's own Selective Service local board.

(*d*) A detailed statement of facts concerning the registrant's refusal to be inducted.

(*e*) Names and addresses of witnesses.

(3) U.S. Army Recruiting District Commanders should contact the United States attorney in their area, in advance, regarding what steps should be taken as to the disposition of any registrant who refuses to be inducted.

(4) A registrant previously forwarded for preinduction examination who refuses to take any part or all of the preinduction tests and examinations and who is returned for immediate induction and again refuses to take any part or all of the prescribed tests and examinations will be informed that failure to submit to such examination as the commanding officer of the induction station will direct is a violation of Selective Service regulations and punishable as such. If he persists in refusing examination, action will be taken as prescribed in (1), (2), and (3) above, except—

(*a*) A statement, if given, will read:

"I refuse to take the preinduction tests and examinations prescribed for induction into the Armed Forces of the United States." As in the case of registrants who refuse induction, a registrant who refuses to submit to examination will not be furnished any means of transportation.

(*b*) Where the word "induct" or "induction" appears in connection with notification to be made to the various Selective Service offices and office of the United States attorney, substitute "examined" or "examination," as appropriate.

Texts of Letter and Memorandum on the Draft

Special to The New York Times

WASHINGTON, *Nov. 8—Following is the text of a letter, dated Oct. 26, to all members of the Selective Service system from the director of Selective Service Lieut. Gen. Lewis B. Hershey, and of a memorandum dated Oct. 24, from General Hershey on draft cards:*

THE LETTER

The basic purpose and the objective of the Selective Service system is the survival of the United States. The principal means used to that end is the military obligation placed by law upon all males of specfied age groups. The complexities of the means of assuring survival are recognized by the broad authority for deferment from military service in the national health, safety, or interest.

Important facts, too often forgotten or ignored, are that the military obligation for liable age groups is universal and that deferments are given only when they serve the national interest It is obvious that any action that violates the military selective service act or the regulations, or the related processes cannot be in the national interest.

It follows that those who violate them should be denied deferment in the national interest. It also follows that illegal activity which interferes with recruiting or causes refusal of duty in the military or naval forces could not by any stretch of the imagination be construed as being in support of the national interest.

The Selective Service system has always recognized that it was created to provide registrants for the armed forces, rather than to secure their punishment for disobedience of the act and regulations. There occasionally will be registrants, however, who will refuse to comply with their legal responsibilities, or who will fail to report as ordered, or refuse to be inducted. For these registrants, prosecution in the courts of the United States must follow with promptness and effectiveness. All members of the Selective Service system must give every possible assistance to every law enforcement agency and especially to United States attorneys.

It is to be hoped that misguided registrants will recognize the long-range significance of accepting their obligations now, rather than hereafter regretting their actions performed under unfortunate influences of misdirected emotions, or possibly honest but wholly illegal advice, or even completely vicious efforts to cripple, if not to destroy, the unity vital to the existence of a nation and the preservation of the liberties of each of our citizens.

Demonstrations, when they become illegal, have produced and will continue to produce much evidence that relates to the basis for classification and, in some instances, even to violation of the act and regulations. Any material of this nature received in national headquarters or any other segment of the system should be sent to state directors for forwarding to appropriate local boards for their consideration.

A local board, upon receipt of this information, may reopen the classification of the registrant, classify him anew, and if evidence of violation of the act and regulations is established, also to declare the registrant to be a delinquent and to process him accordingly. This should

include all registrants with remaining liability up to 35 years of age.

If the United States Attorney should desire to prosecute before the local board has ordered the registrant for induction, full cooperation will be given him and developments in the case should be reported to the state director and by him to national headquarters.

Evidence received from any source indicating efforts by nonregistrants to prevent induction or in any way interfere illegally with the operation of the Military Selective Service Act or with recruiting or its related processes, will be reported in as great detail as facts are available to state headquarters and national headquarters so that they may be made available to United States attorneys.

Registrants presently in classes IV-F or I-Y who have already been reported for delinquency, if they are found still to be delinquent, should again be ordered to report for physical examination to ascertain whether they may be acceptable in the light of current circumstances.

All elements of the Selective Service system are urged to expedite responsive classification and the processing of delinquents to the greatest possible extent consistent with sound procedure.

MEMORANDUM

Subject: Disposition of Abandoned or Mutilated Registration Certificate and Notices of Classification.

1. Whenever an abandoned or mutilated registration certificate or current notice of classification reaches a local board, and the card was originally issued to a registrant by some other board, it should be forwarded to the state

director of selective service, who will forward it to the appropriate local board if within the state, or the appropriate state director if the board of origin is outside the state.

2. Whenever a local board receives an abandoned or mutilated registration certificate or current notice of classification which had been issued to one of its own registrants, the following action is recommended:

(A) Declare the registrant to be delinquent for failure to have the card in his possession.

(B) Reclassify the registrant into a class available for service as a delinquent.

(C) At the expiration of the time for taking an appeal, if no appeal has been taken, and the delinquency has not been removed, order the registrant to report for induction or for civilian work in lieu of induction if in Class I-O, as a delinquent, or in the board's discretion in a flagrant case, report him to the United States attorney for prosecution.

(D) If appeal is taken and the registrant is retained in a class available for service by the appeal board, and the delinquency has not been removed, order the registrant to report for induction or for civilian work in lieu of induction if in Class I-O, as a delinquent, or in the board's discretion in a flagrant case, report him to the United States Attorney for prosecution.

No. 71

Vide No. 65 for Supp. Brief in support of petition. (filed March 29, 1969)

Vide No. 65 for Brief of American Jewish Congress as amicus curiae. (filed on July 31, 1969)